

## Considerations on Corona-Pandemic and BI-Coverage for the German Market

The current corona pandemic requires that we consider the impact of the ever changing regulations to control the pandemic in relation to the settlement of business interruption claims.

This paper summarizes the thinking of Jens Otto of Dr. Franz u. Partner GmbH with regard to the the position in Germany and is provided by Jens in association with BTE the German Association of Loss adjusting experts.

Firstly, when calculating a BI loss the FBUB (German General Fire Business Interruption Conditions) require that all circumstances, favorable or unfavorable, that would have affected the business over the course of the business interruption period must be taken into account - as if the interruption had not occurred.

BI loss coverage is dependent upon the proximate cause, in brief there must be a property loss for which there is policy cover that leads to an interruption of the business which then leads to a loss of profit.

The consequences of the pandemic have a direct impact on the assessment of the "standard" performance of businesses during the period the business is affected and thus also on the BI loss recoverable.

The pandemic may have a "beneficial financial" effect on the situation of certain businesses, e.g. for food markets, manufacturers of protective clothing and medical equipment etc. All sectors that are not "systemically relevant" on the other hand, are unfavorably impacted by the pandemic.

However, the following terms of the FBUB are less clear on how the pandemic should be accounted for:

The FBUB provides precisely three criteria that, if met, release the insurer of its policy liability in cases of the business interruption:

Insofar as the BI loss will be increased (most FBUB require a "significant" increase) due to:

1. Extraordinary events occurring during the interruption period.
2. Regulatory requirements in the reconstruction of the property or operating restrictions.
3. The insured does not have the funds necessary to rebuild or reacquire the damaged, lost or destroyed assets in due time.

### 1. Extraordinary events occurring during the interruption period

The reason for the exclusion of extraordinary events occurring during the business interruption is that the BI-loss must be a direct consequence of physical damage to tangible assets (BI chain of causality). The relevant paragraph in the conditions therefore only clarifies the general conditions, since extraordinary events occurring during the BI period are not a direct consequence of the physical damage to tangible assets.

Thus, it must be an wholly unforeseeable event, which leads us to the following questions:

- a. Does a pandemic meet the definition of an "extraordinary event" in the sense of the FBUB as described above?
- b. Must the "extraordinary event" relate to the individual risk or can it also relate to the market as a whole?
- c. Is it an extraordinary event, if the entire market is impacted over a long period of time?
- d. According to the FBUB, the extraordinary event must occur during the BI indemnity period. Does this mean that the effects of the pandemic are not relevant (even if they would significantly increase the loss of profit and would therefore be classified as extraordinary) if the

pandemic commenced before the damage occurs (for instance once the WHO declared a pandemic in relation to Covid-19 it would no longer be unforeseeable).

- e. The question arises whether new regulations and restrictions that come into place amount to a new "event".

## **2. Regulatory reconstruction or operating restrictions**

- a. Are the pandemic related instructions of the Federal Government, the States, cities and municipalities within the definition of "operating restrictions" in the sense of the FBUB?
- b. If so, should it be that only the operating restriction, which arises after the damage causing the interruption be applicable? The terms state "to the extent that the BI loss increases". Thus, the BI loss must already have occurred.

## **3. The insured does not have the funds necessary to rebuild or reacquire the damaged, lost or destroyed assets in due time**

- a. Even this term may become more relevant after a longer period of pandemic related business closures, because companies most likely will have less capital available.

It remains to be seen if these issues will become relevant. In any case, such issues have to be considered if, for example, the restoration of a plant is delayed, and production and sales could have been resumed earlier had it not been for the pandemic.

The question then arises, as to whether the BI loss is as a result of the extraordinary event.

A comparison of the BI loss with a pandemic, with a possibly lower standard turnover already considered, to a fictitious BI loss without taking the pandemic into account.

Should the loss increase considerably, the question then arises whether the pandemic represents an extraordinary event, if the calculation of the BI loss already accounts for the conditions of the pandemic.

If on the other hand the BI loss calculated taking account of the pandemic would have been lower than the fictitious BI loss without an impact from the pandemic then the fictitious loss indemnity calculation would be disregarded. However, consideration must then be made of the possibility that the period of interruption is extended because of the pandemic. A decision must then be reached as to whether the recoverable loss should be calculated including or excluding the effects of the pandemic.

The decisions will doubtless be made on a case-by-case basis. Nevertheless, it is better to think ahead and be prepared for those challenges before us.

In this context, there are also other topics to consider, such as the treatment of subsidies and federal rescue packages, especially for sectors such as hospitals. ...

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